

TEMP0001

[DUI Blood Draw - AFFIRM]

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution, Article VI, Section 16, and A.R.S. Section 12-124(A).

This matter has been under advisement and the Court has considered and reviewed the record of the proceedings from the trial court and the memoranda submitted by counsel.

The Appellant claims that a phlebotomist who is not supervised by a physician (as medical assistants are required under A.R.S. Section 32-1456(A)) is not a "qualified person within the meaning of A.R.S. Section 28-1388(A)" authorized to perform a blood draw to test for blood alcohol content. Therefore, Appellant asserts that the trial judge erred in denying his Motion to Suppress the results of the blood draw.

First, this Court notes that A.R.S. Section 32-1456(A) is a regulatory statute governing medical assistants. That statute has no applicability to a forensic blood draw in a criminal case.<sup>1</sup>

Evidence was presented to the trial judge that a qualified individual performed the blood draw in this case. It is important to note that there is no question but that the blood draw was performed properly by someone who knew what (s)he was doing, who had experience, and that no physical harm was caused to the Appellant during the blood draw. The only question is whether the phlebotomist was supervised by a physician. The trial judge found that the phlebotomist was a qualified individual within the meaning of applicable law.<sup>2</sup>

Most importantly, A.R.S. Section 28-1388(A) provides in the second sentence of the section:

The qualifications of the individual withdrawing the blood and the method used to withdraw the blood are not foundational prerequisites for the admissibility of a

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<sup>1</sup> State of Arizona ex rel. Pennartz v. Olcavage, slip. op. in 1 CA-SA 01-0130 (filed 8-30-01). This Court is bound by Pennartz v. Olcavage, Id., though its mandate has not yet issued. See Francis v. Arizona Dept. of Transp., 192 Ariz. 269, 963 P.2d 1092 (App. 1998).

<sup>2</sup> A.R.S. Section 28-1388(A); State v. Nihiser, 191 Ariz. 199, 953 P.2d 1252 (App. 1997).

blood alcohol content determination made pursuant to this subsection.

Appellant seems to have ignored the second sentence of this statute as quoted above. Clearly, our legislature has provided that the qualifications of the individual or phlebotomist withdrawing the blood are not foundational prerequisites for the admissibility of the alcohol content of the blood. There is no statutory nor constitutional right to have a medical assistant or phlebotomist supervised by a physician perform a blood draw under either Arizona law or Federal law.

Appellant's complaints regarding the phlebotomist are, therefore, without merit. The trial judge correctly denied the Motion to Suppress for the reasons that the qualifications of the person making the blood draw are not prerequisites to the admissibility of the results of the blood draw.

IT IS THEREFORE ORDERED affirming the judgments of guilt and sentences imposed by the lower court.

IT IS FURTHER ORDERED remanding this case back to the trial court for all future proceedings.